UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO, CALIFORNIA

O'CONNOR WOODS HOUSING CORPORATION d/b/a O'CONNOR WOODS

Employer

and

KELLIE YANG, an Individual Petitioner

Case 32-RD-1536

and

UNITED HEALTHCARE WORKERS WEST, SEIU (SERVICE EMPLOYEES INTERNATIONAL UNION) Union

Kellie Yang, An Individual, Stockton, CA, for the Petitioner.¹

Bruce Harland, Esq., (Weinberg, Roger and Rosenfeld) of Alameda, CA., for the Union.

Ellen Bronchetti, Esq., Andrew Spurchise, Esq. and Michael Pedhirney, Esq., (Littler Mendelson) of San Francisco, CA, for the Employer.

ADMINISTRATIVE LAW JUDGE'S REPORT ON OBJECTIONS TO ELECTION

JAMES M. KENNEDY, Administrative Law Judge: On May 5, 2007² Kellie Yang, an individual, filed with Region 32 of the National Labor Relations Board (the Board) a decertification petition in Case 32-RD-1536.³ Subsequently, pursuant to a Stipulated Election Agreement approved on September 21, Region 32 conducted an election by secret ballot on November 2 in Stockton, California in an appropriate unit. Following the election, the Union filed timely objections thereto. I held a hearing on the Union's Objections to the Conduct of the Election on March 11, 12, and 14, 2008 in Oakland, California.

¹ Kellie Yang was not present at the commencement of the hearing and did not make a formal appearance.

² All dates refer to 2007 unless otherwise stated.

³ Where not otherwise noted, the findings herein are based on the formal documents, the stipulations of counsel, and/or unchallenged credible evidence.

I. Background

The Employer operates a residential community for the elderly. In February 2006, the Board certified the Union as the collective-bargaining representative of the employees of the Employer in the following unit (the Unit):

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All full-time and regular part-time (including per diem) Certified Nurse Assistants (CNAs), Nurse Assistants (NAs), Routine Aid/Restorative Nurse Assistants, Supply/Storeroom Clerks, Cooks, Lead Cook, Dietary Aides, Dining Service Coordinator, Hosts/Hostesses, Waitresses/Waiters, Wait Staff, Food Servers, Dishwashers, Janitors, Laundry Aides, Housekeepers, Personal Care Assistants/Aides, Activities Assistants/Aides, Activities Coordinators, Bus Drivers, Service Plus Assistants/Home Service Assistants, Maintenance Workers I, II and III, and Groundskeepers employed by the Employer at its Stockton, California facility; excluding all managerial and administrative employees, Licensed Vocational Nurses (LVNs), Registered Nurses (RNs), all business office clerical employees, receptionists, medical records assistants, confidential employees, employees currently provided to the Employer by temporary service or employment agencies, all other employees, guards, and supervisors as defined in the Act.

Thereafter, the parties entered into negotiations for a collective-bargaining contract but failed to reach agreement.

II. The Decertification Election and the Union's Objections

Following the filing of the decertification petition, the Employer engaged in a campaign to encourage employees to vote against continued union representation. In the course of its campaign, the Employer held nonmandatory meetings with groups of employees in which supervisors discussed various bargaining unit issues and distributed a number of flyers urging employees to vote against the Union in the election. There were also informal supervisory encounters covering the topic.

On November 2, pursuant to the decertification petition, Region 32 conducted an election among the Employer's employees in the Unit. The Tally of Ballots served on the parties at the conclusion of the election showed 102 votes for the Union and 105 votes against.

On November 8, the Union filed timely objections to conduct affecting the results of the election. On February 29, 2008, the Acting Regional Director of Region 32 issued a Report and Recommendations on Objections and Notice of Hearing, overruling the Union's Objections Nos. 1, 2, 4, 7, 8, 9, 11, 12, and 13 and setting Objections 3, 5, 6, and 10 for hearing.⁴

A. Objection 3

The Employer threatened employees with the loss of existing benefits if the Union won the election in order to affect the outcome of the election.

⁴ No exceptions were filed to the Acting Regional Director's report, which the Board adopted on March 26, 2008 (unpublished order).

1. The Context

About two weeks prior to the election, housekeeping supervisor Jason La Rose⁵ began a conversation with housekeeper Dionida Mann which fellow housekeeper Edwin Camba later joined in quarters they were cleaning. La Rose gave Mann an employer campaign flyer dated October 16, entitled, "There are NO Guarantees with Collective Bargaining." This two-sided document is a strongly worded argument against union representation. It seems to simply be making the standard observation that collective bargaining involves negotiations the outcome of which is uncertain, but becomes much stronger than that. It first recites that the union had promised a quick contract, using an ellipsis to demonstrate that the promise had not been kept. In the same breath it claims that the Employer has been bargaining in good faith for since March 2006, but despite its efforts no contract has been reached; that two years had passed since the previous election. The subtext here is that the Union has failed.

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The flyer's first bullet point asserts that the NLRB has found it has been bargaining in good faith. That is untrue, since the Board has never ruled on the point, though the Board's Regional Office has dismissed at least one unfair labor practice charge on the point. Yet such a dismissal is not evidence of good faith bargaining; it is only evidence that there was, in the Director's opinion, insufficient evidence to warrant a complaint on the point. The way this has been written it is an assertion that the NLRB has approved its bargaining stance. It is therefore inaccurate and misleading.

The next bullet point is an effort to turn the employees against the Union. It asserts that the Union 'could be' willing to give up something the employees want, in favor of something the Union wants, citing a clause that says employees would have to pay the Union "or not be scheduled to work" and that the Union has already demanded such language. This is a mischaracterization of how a union security clause operates. An employee who refuses to comply with a valid union security clause can be discharged, but it would not affect a daily schedule. This point suggests the Union has a corrupt motive, bribery, behind its desire for such a clause.

The third point is the standard argument that if the parties can't agree on a contract, the Company can implement its own final offer. The fourth describes the Union's choices in the event of an impasse: accept, work without a contract which may prevent wage increases, go on strike, or walk away. The working without a contract option leading to no wage increases is problematic as a matter of law if a legitimate impasse has taken place.

The last bullet asserts that employees could wind up with more or less than they have now, or with exactly the same thing. Yet no matter what, the flyer says, with a contract the employees would have to pay union dues. It asserts that at a the local Beverly Healthcare Center, the Union has negotiated a contract which requires the employees to pay 35% of their wage for individual health coverage . . . plus pay 2% of their pay in union dues.

It concludes the first page with a bolded "There are RISKS to collective bargaining."

On the reverse, under the guise of stating what the law says about those risks, are a series of boxes purporting to state the law. The first is a quote of Section 8(d) of the Act, but emphasizing the statute's recitation that good faith bargaining does not compel agreement or

⁵ The parties stipulated that La Rose was a supervisor within the meaning of Section 2(11) of the Act.

the making of concessions. The second starts with the headline "Your Benefits Can Be Reduced." In support it cites a 1961 case where the Board adopted a Trial Examiners statement that ". . . there is, of course, no obligation on the part of an employer to contract to continue all existing benefits, nor is it an unfair labor practice to offer reduced benefits. . ." (*Midwestern Instruments*, 133 NLRB 1132 (at 1138). Of course the quote truncates what the Trial Examiner's analysis actually was; he also noted that such matters could be a factor in assessing an employer's good faith bargaining.

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The third headline is "Your Benefits Can Be Given Up By the Union." Again citing language found in a Board case, *La-Z-Boy*, 281 NLRB 338, 340 (1986), the Employer says ". . . in the give and take of bargaining [a] union might give up insurance, holidays, or vacation time to obtain dues checkoff from employer." The quote, however, does not come from the Board or one of its judges; it is a judge's description of what a manager had said to the employees. It is not a statement of law. The Employer misleads when it cites this quotation as a statement by the Board.⁶

The next box headline is "You Could Wind Up With Less." The quote is "Collective bargaining is potentially hazardous for employees, and that as a result of such negotiations, employees might possibly wind up with less benefits after unionization than before." Once again, this is a statement by the Board which is taken out of context, though not entirely unfairly. The full context is this:

Taken together, these statements do not simply confine themselves to the legitimate message that collective bargaining is potentially hazardous for employees and that as a result of such negotiations employees might possibly wind up with less benefits after unionization than before. Rather, these statements can only be taken as meaning that Respondent intended to adopt a bargaining stance designed to insure that collective bargaining could not result in any increases in benefits for the employees and would probably result in decreased benefits-in short, that unionization, if it had any effect at all, would, because of Respondent's intransigence, result in worse benefits, not better. [Bolding is what the Employer quoted.]

Coach and Equipment Sales, 228 NLRB 440, 441 (1977)(The Board found a violation of the Act and ordered a second election).

While the quote may fairly state the law, it is certainly out of context and was being used by the Board as a contrast to the actual facts presented in that case.

The last headline on the back of the flyer is "Collective Bargaining Does Not Begin With What You Have Now." First, that is misleading because it sounds as if bargaining <u>must</u> start somewhere other than what an employer currently provides in wages and working conditions. As we know, though, bargaining can certainly start at that point if the parties so choose. Indeed, it can start anywhere the parties agree to start. Second, in support, the employer partially quotes a 1968 decision by the Sixth Circuit Court of Appeals in Cincinnati: "The U.S. government and the NLRB do not guarantee employees that the collective bargaining process starts from where you presently are in wages, insurance, pensions, profit sharing, and other conditions of employment." *Bendix Corp. v NLRB*, 400 F.2d 141, 146. Again, it's somewhat out of context, but not unfairly so.

⁶ In fact, the Employer's legal citation is incorrect, citing to the case's slip number, instead of the page number, but without saying so. One could regard that as an attempt to obfuscate.

Citing such a quotation is the invocation of the 'bargaining from scratch' or bargaining from 'zero' threat. In the abstract, the quote accurately states an employer's right at the beginning of good faith bargaining. Yet, in a decertification context, where the parties have already been bargaining for 18 months and presumably have made some progress, such a statement loses much of its abstract innocence. Now it has become a threat, for the Employer is saying that if the Union wins the election, it may well respond by throwing out all the progress that has been made so far and start bargaining from scratch this time, even though it did not start there before. As a threat, it violates the Act. See *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), enfd. 810 F.2d 638 (9th Cir. 1982); also *Lear-Siegler Mgt. Svcs Corp.*, 306 NLRB 393 (1992).

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2. Statements of Supervisor Jason La Rose

After receiving the flyer, Mann told La Rose she was now for the Union. She said La Rose then asked, "If the Union gets here, do you know that you guys will lose your medical insurance, medical benefits?" Mann replied she did not think that would happen.

La Rose's version of this conversation was that Camba asked what was going to happen with benefits, to which Mann said that when she had been a union employee, her benefits were excellent. La Rose gave the two employees copies of the "No Guarantees" flyer. He told them the company was "in bargaining" with the Union, and it was unknown what would happen at the end, that things could be better, they could remain the same, or they could be a "little different." La Rose was adamant that he did not say things could get worse or that employees could get less than they had, even though that was the clear import of the flyer, if not an actual threat. Camba did not testify.

I give controlling weight to Mann's testimony. At the time of the hearing, she was employed by the Employer, and as a current employee, the Board has held employee testimony likely to be reliable when, as here, she has testified adversely to her current employer. Moreover, she was clear and unequivocal about what she heard La Rose say. La Rose, on the other hand, placed an undue emphasis on having told the two employees that post-negotiation benefits could be a "little different." Not only did La Rose's emphasis seem strained, but such a statement would reasonably be expected to elicit questions or at least some interest as to how benefits would differ, yet La Rose recounted none. The incongruous tone of his account detracts from his credibility.8

Moreover, given the message that the flyer was imparting, there is a strong likelihood that La Rose believed and stated that the failure of the decertification process would result in the loss of the benefits the employees enjoyed without representation. This flyer, and the others that followed, were part of a drumbeat of horribles coming from the Employer, not just a bare recitation of the realities of bargaining. They emphasized that there was a real threat that existing benefits could not be maintained at all if the Union were to stay.

⁷ Georgia Rug Mill, 131 NLRB 1304, 1305, n. 2 (1961), modified on other grounds 308 F.2d 89 (5th Cir. 1962). See also Advocate South Suburban Hospital, 346 NLRB 209 n. 1 (2006), citing Flexsteel Industries, 316 NLRB 745 (1995).

⁸ I have considered the Employer's argument that because its supervisors were provided extensive training on how to comport themselves in accordance with the law, it is unlikely they made the statements alleged in the Union's objections. Notwithstanding the training, for the reasons set forth here, I have assigned credibility as noted.

This is well beyond simple statements of the law. Indeed, the constant repetition that benefits are at risk, can easily convert the reality of risk into a threat of loss. La Rose, even if trained properly, can easily be seen to have lost sight of the line which must not be crossed if the election process is to maintain any integrity. And, of course, he crossed it because the flyers led him to do so.

3. Statements of Supervisor Jimmy Garcia

About a week before the election, maintenance supervisor Jimmy Garcia⁹ in a hallway spoke about the Union with a group of housekeepers, including Mann, Guadalupe Sandoval, Marquita Camarena, Edith Eligio, and Bonita _____. According to Mann, at one point Garcia said that if the Union won the election, "You guys are going to lose your health insurance." Mann disagreed, saying, "No Jimmy, I was with the Union for ten years, and I know how the Union works."

Sandoval testified that during this conversation, Garcia said that if the employees voted yes, they would lose benefits such as healthcare. Sandoval responded that it would be much better when the Union was in, to which Garcia replied, "No, they will not be better." Under cross examination, Sandoval agreed that Garcia said he did not know for sure whether employees would get more or less benefits. When asked on redirect what Garcia's exact words were, Sandoval testified, "That we'll lose the benefits."

The Employer called Camarena who had served as the Employer's observer at the decertification election as a witness to this conversation. She testified that Sandoval asked Garcia why the company did not give employees better benefits. Garcia said there was a chance employees could lose their benefits "with the election," to which Mann replied, "No, we won't."

Garcia's version: In October Mann broached the topic of healthcare benefits with him, asking whether employees would get free benefits if the Union won the election. Garcia replied that his past two employers did not provide full health benefit coverage. Garcia denied telling the employees they would lose healthcare benefits if the Union won the election.

I accept Mann's testimony over that of Camarena and Garcia. As before, Mann impressed me as being candid, sincere, and forthright. I also note that by testifying adversely to the Employer, Mann enjoys a reasonable inference of reliability. ¹⁰ As for Sandoval, both parties claim her testimony supports their respective positions. Although clearly doing her best to be truthful and accurate, Sandoval appeared to be a somewhat suggestible witness and tended to agree with whatever question was posed. While I do not find that Sandoval's testimony unequivocally corroborates Mann's, neither do I find that it detracts from Mann's credibility; indeed, I accept that she recalls accurately her own exchange between herself and Garcia.

Sometime later, Mann told about twelve employees what Garcia had said.

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⁹ The parties stipulated that Garcia was a supervisor within the meaning of Section 2(11) of the Act.

¹⁰ See cases cited in footnote 7, supra.

4. Statements of Supervisor Amanda Flores

On October 24, main dining room supervisor Amanda Flores¹¹ conducted an employer campaign meeting of ten to twelve dining room/kitchen employees. During her presentation at the meeting, Flores distributed to employees a flyer dated October 23, entitled "\$\$ Talk is Cheap \$\$." In part, the flyer contrasted the Employer's healthcare benefit package with those of two union-represented facilities and demonstrated, at least arguably, the superiority of the Employer's package. The flyer concluded: "Talk is cheap. Dues are not. Vote No on November 2nd." In the course of the meeting, Flores read from the flyer and talked about the consequences of union representation. One of its points was that although the Employer paid employee-only HMO healthcare insurance in full, the two unionized facilities it was comparing required the employees to pay a large part of the premium from their own pockets. At one, that sum was \$1699 and at the other it was \$1002. This, together with the other better benefits the employer provided (personal time off, holiday/vacations) deliberately inferred its own benefits were something which the Union had been unable to negotiate elsewhere and, parenthetically, might be put in play in the event the Union won the decertification election. The message was: These benefits are at risk. The flyer pointed out that while the hourly pay rate the Employer provided was slightly less than that paid by the two unionized facilities, "mandatory" dues there cost those employees \$393 per year.

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The Employer also asserted that the lower pay rates it was paying were the 2005 rates, claiming it was "legally not allowed to make any changes to the [pay] ranges after the election in October 2005." This message lays the blame for the lack of an increase squarely on the Union, another assertion that the Union is ineffective. This is, of course, inconsistent with the third bullet point of the earlier flyer.

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Employee Daytn Jorgensen, a dishwasher in the main dining room kitchen was present for the last part of the meeting. According to Jorgensen, in addition to reading from the flyer, Flores said full-time or part-time employees would lose some of their benefits if the Union won the election. She declined to be specific about which benefits. Jorgensen was certain that Flores did not say employees "might" lose benefits but that they "would." Within five minutes after the meeting, Jorgensen repeated what he had heard to three other employees in the bargaining unit, including Justin McPherson.

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¹¹ The parties stipulated that Flores was a supervisor within the meaning of Section 2(11) of the Act.

¹² Jorgensen said he was only briefly at the meeting; Flores said he attended the majority of the meeting while sitting in a chair in the hallway. It is unnecessary to resolve this testimonial conflict.

¹³ In its argument, the Employer suggests that Jorgensen distorted Flores' lawful discussion of the risks involved in collective bargaining. It is clear, however, that Jorgensen is able to distinguish between statements of collective-bargaining risks and unqualified statements that employees would lose benefits. Jorgensen testified that on two occasions of uncertain date, he heard Flores tell other employees there were risks involved with collective bargaining that employees could lose benefits or be downsized. Flores did not testify regarding the two occasions Jorgensen described.

¹⁴ It is uncertain from Jorgensen's testimony whether one of the three employees, Tony Contreras, was employed at the time of the election, as Jorgensen testified that he "had recently quit."

Employee Thomasina Guebara attended about five employee meetings in October conducted by Flores. In questioning Guebara, the Employer focused her attention on statements Flores had made regarding healthcare in a meeting Guebara attended about two weeks before the election, presumably the October 24 meeting. According to Guebara, in response to a question by employee Hanna Knackstedt at that meeting, Flores said she did not know what would happen with health benefits if the Union came in, that the benefits might be better, the same, or worse.

Flores testified about the October 24 meeting. Although Jorgensen's testimony related to threatened loss of unspecified benefits, the Employer's examination of Flores centered on her discussion of health benefits at that meeting. Flores denied telling employees they would lose health care if the Union won the election, but her testimony did not address Jorgensen's recollection that she said employees would lose "some of their benefits."

After carefully considering the testimony of all three witnesses, I find Jorgensen's account to be the more believable. His testimony was adverse to the Employer, which, in the absence of any suggestion of animosity toward his supervisor or the company, is not to be regarded lightly.¹⁵ On the other hand, I found Flores' testimony to be inconsistent. She made three different responses concerning whether employees had asked questions about health insurance at the meeting: (1) she could not recall; (2) no one asked her what would happen to health insurance if the Union won the election; and (3) employees "may have" asked what would happen to health insurance if the Union won. In light of these inconsistencies, I don't find trustworthy Flores' assertion that she positively did not tell employees they would lose their healthcare if the Union won.

Moreover, Guebara's testimony, like Flores', does not clearly rebut that of Jorgensen. Indeed, it does not corroborate Flores either. Jorgensen testified that Flores told employees that full-time or part-time employees would lose some of their benefits if the Union won the election but that she would not specify which benefits. Guebara did not recall what Flores said after she read the flyer, and she testified only to Flores' statements regarding healthcare. Even assuming Guebara testified accurately about Flores' healthcare statements, Flores' presentation of a lawful hypothesis about healthcare benefits (they might be better, the same, or worse under union representation) does not preclude the pronouncement of a coercive prediction, i.e., that employees would lose some unspecified benefits if the Union won. That is certainly true given the flyer's message of probable doomed benefits.

Finally, Jorgensen's testimony describes Flores' statements in a manner which suggests that she had truly been informed by the flyer she was reading to make a threat. The flyer is part of the drumbeat seen from the first flyer which basically sends the message that there is a strong likelihood that the current healthcare benefit will be lost if the Union is not decertified. In that context, the probability that Flores would overreach is quite high. Jorgensen said she did and there is no reason to reject his assessment.

Since I credit Jorgensen's testimony, I find that Flores told a gathering of employees they would lose some of their benefits if the Union won the election.

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¹⁵ See cases cited in footnote 7, supra.

5. Discussion of Objection 3

As detailed above, I have found the following supervisors made the following statements to bargaining unit employees on the dates indicated:

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 One to two weeks prior to the election, housekeeping supervisor La Rose told two bargaining unit employees that if the Union were selected, employees would lose their medical benefits.

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• About one week prior to the election, maintenance supervisor Garcia told four bargaining unit employees that if the Union won the election, employees would lose their health insurance.

• On October 24, Flores told ten to twelve bargaining unit employees that employees would lose some of their benefits if the Union won the election.

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The cited statements all occurred in an atmosphere of created dread. The flyers are strong evidence that the benefits the employees currently enjoyed were at heightened risk, simply for invoking the Section 7 right of maintaining union representation. The flyers went well beyond the normal observation that bargaining has risks, even threatening to bargain from scratch, causing a loss of current benefits. In the overview here, the Employer can reasonably be seen as threatening the voters with loss of those benefits if they did not vote no. And, the dread was made more specific by the supervisors who carried out that message in even more explicit terms.

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Indeed, the Employer misled the voters asserting that the Board, the government agency charged with refereeing elections, had sanctioned its statements. That was designed to isolate the employees from the truth about collective bargaining and thereby weaken their resolve. The message was: If the Board couldn't/wouldn't step in and the Union was too weak/corrupt/inept/not aligned with the employees, why bother with union representation since it is an act of futility? The Employer's statements under scrutiny here are likely to have been, at least in combination, a violation of Section 8(a)(1) as an unfair labor practice, had a complaint been issued.

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But, the Board's test for evaluating the conduct of a party in post-election proceedings is an objective one — whether it has "the tendency to interfere with the employees' freedom of choice." *Cambridge Tool & Mfg.*, 316 NLRB 716 (1995).¹⁶ In determining whether the conduct has "the tendency to interfere with the employees' freedom of choice," the Board considers nine factors: (1) The number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; ¹⁷ and (9) the degree to which the misconduct can be attributed to the party. See *Cedars-Sinai Medical Center*, 342 NLRB 596,

¹⁶ The objective standard applies in representation proceedings during an election's critical period where there has been no unfair labor practice allegation or finding. The critical period "commences at the filing of the representation petition and extends through the election." *E.L.C. Electric, Inc.,* 344 NLRB 188, 189, n. 6 (2005), citing *Ideal Electric Co.,* 134 NLRB 1275 (1961). The pre-election critical period here began on May 5.

¹⁷ Hopkins Nursing Care Center, 309 NLRB 958 (1992).

597 (2004), citing *Taylor Wharton Division Hrasco Corporation*, 336 NLRB 157, 158 (2001), et al.; *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

Applying the *Cedars-Sinai* factors to Objection 3, it is clear that many of the criteria for finding objectionable conduct have been met: in separate encounters, supervisors La Rose, Garcia, and Flores told a total of 16-18 bargaining unit employees that selection of the Union in the upcoming decertification election would result in a loss of certain of their benefits, which forewarning was further disseminated among employees. Such threats of benefit loss, particularly health insurance coverage, were likely to cause fear among employees in the bargaining unit and to persist in their minds through the election, which occurred shortly thereafter. And the threat to bargain from scratch most certainly interfered with employee free choice. Given the closeness of the vote, the statements and threats are certain to have affected the results of the election. See *Valerie Manor*, 351 NLRB No. 94 (2007); *Mid-South Drywall Co., Inc.*, 339 NLRB 480, n. 7 (2003); *Hopkins*, supra. Accordingly, I recommend the Union's Objection 3 be sustained.

B. Objection 5

The Employer interrogated eligible voters regarding their union sentiments in order to affect the outcome of the election.

At the end of July, during the critical period, Daniel Morrow, Dining Services Director, interviewed kitchen employee Justin McPherson pursuant to McPherson's application for promotion to a dining room supervisor position. According to McPherson, Morrow asked him how he felt about the Union. When McPherson expressed indifference, Morrow asked how he would feel about supervising union employees. 40

Morrow said, prior to interviewing McPherson, he had heard that McPherson supported the Union. According to Morrow, at the interview, he reminded McPherson that the position he had applied for was not within the bargaining unit, of which McPherson was a member. He asked McPherson how he felt about supervising bargaining unit employees and how he would handle the change from the bargaining unit to supervising members of the bargaining unit if

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supervisor Garcia's conversation with other employees about loss of benefits was friendly and therefore not coercive. The *Toma* case involves interrogation not threats, and the Employer has provided no authority that an amiable conveyance of a threat dispels coercion. *Real Foods*, 350 NLRB No. 32 FN4 (2007), also cited by the Employer, is inapposite. In that case, supervisory statements did not have a reasonable tendency to coerce because they were, respectively, clear statements of personal feelings/experiences and a third-hand report of a company

executive's anti-union feelings.

19 Although McPherson did not receive a promotion at that time, he was later promoted to lead cook, the position he held at the time of the hearing.

²⁰ Melanie McCarthy who was Dining Services Manager in Independent Living at that time was also present at the interview. She was terminated by the Employer in September and was not called as a witness.

selected. Morrow quoted McPherson as answering, "I can live with the Union and I can live without the Union." Morrow denied asking McPherson how he felt about the Union.²¹

In considering which of these two accounts to accept, I note McPherson testified adversely to his employer's position, and there was no evidence of animosity to motivate his testimony. Indeed he had been promoted to lead cook a couple of months earlier, which might reasonably be expected to elicit loyalty. These circumstances support the likelihood of his testimonial reliability.²² Moreover, there is an incongruity in Morrow's testimony that prevents me from fully crediting his account: Morrow said that in response to his asking McPherson how he felt about supervising bargaining unit employees and how he would handle a change from the bargaining unit to supervision, McPherson replied, "I can live with the Union and I can live without the Union." McPherson's answer is puzzlingly nonresponsive to Morrow's alleged questions. His answer is, however, unmistakably responsive to the question, "How do you feel about the Union." Accordingly, I credit McPherson's testimony and find that in July, Morrow interrogated him about his union sympathy.

The Board has long held that asking an internal applicant for a supervisory position to express his feelings about unions in the job interview is coercive. NLRB v. Bell Aircraft Corp., 206 F.2d 235, 236-237 (2d Cir. 1953), enfq. 101 NLRB 132 (1952); Bendix-Westinghouse Air Brake Co., 161 NLRB 789, 791-792 (1966). Cf., Cowles Communications, 170 NLRB 1596, 1597 n. 3 (1968)(In Section 8(a)(2) context employer may not require internal supervisor applicant to join assisted union as a condition of the promotion). In a post-election context, whether Morrow's interrogation of McPherson had the tendency to interfere with his freedom of choice is best determined by applying the Cedars-Sinai factors. Although Morrow's interrogation is only one instance of that particular kind of coercion during the critical period and although it was not accompanied by any threats, an alteration in only two of the votes cast against the Union would have changed the election results. While the interrogation preceded the election by several months, the Employer was engaged in a vigorous union ouster campaign during that time. Plus, in October, Jorgensen informed McPherson of Supervisor Flores' coercive statements detailed above. In these circumstances, the interrogation of even one employee could be expected to affect the results of the election. Accordingly, I recommend the Union's Objection 5 be sustained.

C. Objection 6

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The Employer threatened eligible voters with loss of their jobs and layoff if the Union won the election in order to affect the outcome of the election.

In October, Justin McPherson overheard a few minutes of Flores' campaign presentation to wait staff employees. According to McPherson, Flores sounded as if she were reading from a flyer. After she read one of the bullets that employers have the right to downsize, she explained

Under cross-examination. Morrow testified:

²¹ Under direct examination, Morrow said:

Q Did you ever ask [McPherson] whether he supported the Union?

A Not . . . in that direct sense, no.

Q So, you did ask him about how he felt about the Union, is that right?

A I didn't ask him how he felt about the Union. I asked him how he felt about supervising employees that were going to be members of the Union.

²² See cases cited in footnote 7, supra.

that if the Union came in, the company might not be able to afford it, and the company might have to downsize.²³ McPherson told a cook named Shannon what he had overheard.

Flores testified that she held a campaign meeting with employees on October 9 during which she distributed a flyer entitled, "What can the SEIU union REALLY do for you?" The flyer provided a summary description of some of the terms of the 2006-2008 collective-bargaining agreement between the Health Care Workers Union SEIU 250 and the Beverly Healthcare Center-Stockton. Flores read the following from the second page of the flyer:²⁴

The Employer retains the exclusive right to manage the business, to direct, control and schedule its operations and work force and to make any and all decisions affecting the business, hire, promote, demote, layoff, assign, transfer, suspend, discharge and discipline; determine overtime rules; select and determine the number of its employees, including the number assigned to any particular work or work unit; direct and schedule the workforce; determine the work duties of employees; select supervisory employees; transfer employees, either temporarily or permanently, within programs and/or classifications.

Flores said she did read the bullet point from the front page of the flyer that stated: "[At Beverly Healthcare Center, the SEIU] *** does not stop the Employer from reorganizing, discontinuing, enlarging or reducing a department." Regarding mention of downsizing, Flores testified:

Q (by Ms. BRONCHETTI): Did the subject of downsizing come up at all during that meeting?

A Not—it wasn't a main subject that I ever talked about.

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Q (by Administrative Law Judge): Something came up, maybe not much, but something?

A Yes, something.

Q (by Ms. BRONCHETTI): Did you say the word "downsizing" at any time during that meeting?

A I may have, yes.

Q (by ADMINISTRATIVE LAW JUDGE): ...did you or didn't you use the word "downsizing?"

A I will say yes.

Q (by Ms. BRONCHETTI): And what did you say about downsizing?

A I used the word downsize, referring to reducing a department, as I was reading from the flyer.

Q Is that all you said about downsizing?

²³ The Employer offers, arguendo, a milder construction of McPherson's testimony, i.e., that Flores said the company might have to downsize if costs increased. There is no record support for such a construction, and I reject it.

²⁴ The words read by Flores were excerpted from the lengthy management rights clause of the Beverly Contract, the full text of which formed the second page of the flyer.

- A Yes.
- Q You used that word as a synonym for reducing a department?
- A Yes.
- Under cross-examination, Flores testified:
 - Q (by Mr. Harland): You said [downsizing] was discussed at some length; that was your direct testimony?
- A At a short length.
 - Q So you mentioned the word "downsize" more than just once, right?
 - A No.
 - Q So it was such a short length, it was just once?
- 15 A Yes.

To my observation, McPherson attempted to provide an accurate and honest recollection of what he heard Flores say. His account was somewhat abbreviated because he heard only a few minutes of Flores' discussion. In rebuttal of McPherson's testimony, the Employer offered only Flores as a witness, and her testimony was unforthcoming if not evasive. She was clearly uncomfortable answering questions about any downsizing statements she may have made, and her answers vacillated between a tacit admission that she had briefly discussed the issue and an assertion that she had only substituted the word "downsizing" for the phrase "reducing a department" in the flyer's bullet point. Her equivocation further justifies accepting McPherson's testimony that Flores warned employees of possible downsizing if the Union came in.

In the Employer's view, Flores did nothing more than point out that under the management rights clause of the Beverly contract, Beverly Healthcare Center retains the right to downsize and that even if the Union won the instant election, the Employer could, through negotiations, likewise retain the right to downsize. Citing *Manhattan Crowne Plaza Town Park Hotel*, 341 NLRB 619, 619-620 (2004), the Employer argues that even if Flores told employees the company "may have the right to downsize," that statement is no basis for overturning the election.

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In considering the application of *Manhattan Crowne Plaza* herein, I note that Flores made stronger statements than merely that the company "may have the right to downsize." Moreover, her statements are significantly different from the employer statements in *Manhattan Crowne Plaza*. In that case, the employer provided recent, concrete examples of negative consequences devolving upon another group of employees when the union representing them rejected the employer's bargaining offer. Stating that "each set of negotiations is different," the employer in *Manhattan Crowne Plaza*, described what had happened at the businesses of the other employers, leaving employees to infer from those factual examples what might happen to them in similar circumstances. In the instant matter, Flores provided no point of reference or objective framework in speaking of downsizing other than to assert that the company might not be able to afford the Union; she provided no factual information about the Employer's circumstances or those of similarly situated companies, and she did not place her speculative predictions in the context of negotiations.

Employer statements that employees could lose benefits must be based on objective considerations. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). It is true, as the Employer points out, that employer statements to the effect that employees could lose benefits

as a result of bargaining have been found lawfull where they 'merely [state] what could lawfully happen during the give and take of bargaining,"25 However, Flores' did not confine her remarks to lawful parameters. Rather, she baldly informed employees the Company might have to downsize if the Union came in, leaving to employees to guess whether objective circumstances, lawful bargaining considerations, or perhaps retaliatory motives would generate downsizing. Flores also failed to provide any objective basis or factual examples for her speculation. When employer statements are not "carefully phrased on the basis of objective fact . . . as to demonstrably probable consequences beyond . . . [the Respondent's] control . . . ," they constitute objectionable conduct. See Gissel, supra, at 618. The Board also requires that employer predictions be based on objective considerations. DTR Industries, Inc., 350 NLRB No. 85, slip op. 1-2 (2007), and see Stanadyne Automotive, 345 NLRB 85, 89 (2005), relied on by the Employer, where the Board found unobjectionable statements were based on objective facts and TVI, Inc, 337 NLRB 1039 (2002), also cited by the Employer, where a supervisor lawfully stated that if the company could not afford higher wages, employees might lose their jobs, basing the prediction on daily store revenues. When Flores, without objective qualification, told employees the Employer might have to downsize if the Union stayed in, her statements became objectionable. As the evidence shows that far more employees than the two whose votes could change the results of the election were subjected to Flores' objectionable conduct, I recommend the Union's Objection 6 be sustained.

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D. Objection 10

The Employer polled eligible voters for grievances and issues in order to influence the outcome of election.

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The Employer has a contract with St. Joseph's Hospital in Stockton to provide employment assistance benefits to its employees through the St Joseph's Employee Assistance Program (EAP). Under those auspices, the Employer offers its employees counseling services in such areas as substance addiction, depression, stress management, and family problems

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In July, Margarita Vega, the Employer's Human Resources Representative, arranged with Diane Reyes, the St. Joseph's EAP program administrator, to have Joanne Gonzalez, one of its counselors, to talk to the Employer's employees about access to EAP and to provide training regarding work stress, coping techniques, conflict resolution, and team building. Someone told Gonzalez that a union organizational drive was occurring at O'Connor Woods and that it was a likely source of employee stress.

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On September 5, Gonzalez spoke to a meeting of 10-20 of the employer's certified nursing assistants (styled as 'in-service' training for these licensed personnel), all of whom are bargaining unit employees. In pertinent part, Gonzalez told the employees that the EAP offered stress assistance and that tension among employees and the Company and/or their co-workers might be caused by the union's presence at the Company. According to CNA Phally Ouk, Gonzalez thrice inquired whether there was a reason why employees wanted the Union and what benefits they expected to receive. When no employee responded to any of the three inquiries, Gonzalez distributed blank paper and asked employees anonymously to write their feelings about why they wanted the union and what they thought its benefits were. At that point, Vega beckoned Gonzalez out of the room and instructed her not to mention the Union.

²⁵ BP Amoco Chemical-Chocolate Bayou, 351 NLRB No. 39, slip op. 5 (2007), citing Flexsteel Industries, 311 NLRB 257 (1993).

When Gonzalez returned, she never mentioned the Union again, nor did she ask employees to turn in the papers. Nevertheless, no employer representative retracted Gonzalez' questions. According to Gonzalez, whose account of the meeting essentially corroborated Ouk's, some employees left papers near her after the meeting. Only two papers were written on; no evidence was adduced concerning what had been written or what was done with the two writings.

Applying the *Cedars-Sinai* factors to the Employer's July EAP discussion with employees, it does not appear the incident was likely to cause fear among the employees in the bargaining unit. Gonzalez' questions about the Union were clearly related to her concern about work-related stress on employees rather than a quest for information about union partisanship. No employee orally answered Gonzalez' questions about the Union, and when she asked them to write their union-related feeling, she assured them of anonymity and confidentiality. Moreover, when Gonzalez returned to the meeting after Vega called her out, she abandoned all mention of the Union and did not attempt to gather the papers. While I am mindful of the closeness of the vote herein, I cannot find that Gonzalez' questions had any "tendency to interfere with the employees' freedom of choice," *Cambridge Tool Mfg*, Supra. Accordingly, I recommend the Petitioner's Objection 10 be overruled.

20 Recommendation

Based on the above, and observing that his election was not conducted under the laboratory conditions required by *General Shoe Corp.*, 77 NLRB 124, 127 (1948). I recommend that Objections 3, 5, and 6 be sustained and that Objection 10 be overruled. In view of the seriousness of the conduct addressed in Objections 3, 5, and 6, which was committed by admitted supervisors during the critical period, and in view of the fact that numerous unit employees were exposed to the objectionable conduct, I conclude the Employer's conduct affected the results of the Board election in Case 32-RD-1536. Accordingly, I recommend that the Board election in Case 32-RD-1536 be set aside and a new election be directed.²⁶

I deem the circumstances appropriate to also recommend that the following language be included in the Notice of Second Election in accordance with *The Lufkin Rule Co.*, 147 NLRB 341 (1964), and *Fieldcrest Cannon, Inc.*, 327 NLRB 109, 110 n. 3 (1998).

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²⁶ Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by April 29, 2008. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.

Notice to All Voters

The election conducted on November 2, 2007 was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' 5 exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties. 10 Dated, Washington, D.C. April 15, 2008 15 James M. Kennedy Administrative Law Judge 20 25 30 35 40